No. 11150

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

EUGENE E. RITCH and A. W. HALL, *Appellants*,

vs.

PUGET SOUND BRIDGE & DREDGING CO., INC., a corporation; JOHN R. RUMSEY, a sole trader doing business as Rumsey & Co., together doing business as Rumsey Puget Sound, a copartnership, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

## APPELLANTS' OPENING BRIEF

FLORENCE MAYNE,
*Attorney for Appellants.*

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## SUBJECT INDEX

## TABLE OF CASES

Page

**STATUTES**



**RULES**



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| | |
|---|---|
| EUGENE E. RITCH and A. W. HALL, *Appellants*, vs. PUGET SOUND BRIDGE & DREDGING CO., INC., a corporation; JOHN A. RUMSEY, a sole trader doing business as Rumsey & Co., together doing business as Rumsey Puget Sound, a copartnership, *Appellees*. | No. 11150 |

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### JURISDICTION

Neither the jurisdiction of the District Court to try this action nor of the Circuit Court of Appeals, Ninth Circuit, to entertain this appeal is in dispute.

Complying with Rule 20, Section 2 (b), however, appellants make the following statement regarding the jurisdiction:

(1) Appellants rely upon the United States Statute to be found in United States Code Annotated, Title

28, Section 41 and Supplement (Judicial Code, section 24, amended), which confers upon the district courts original jurisdiction in controversies arising under the Constitution or laws of the United States and involving more than $3,000.00, and also original jurisdiction in all suits and proceedings arising under any law regulating interstate commerce (Subsections 1 and 8).

Appellant's action involves not only interpretation of a Federal law and more than $3,000.00, but it is brought under the Fair Labor Standards Act, U. S. C. A. Title 29, sections 201-218 inclusive, passed by the Congress of the United States in 1938, which is a law regulating commerce between the states. The basic questions of law and fact in the trial court, as well as upon appeal, are whether or not the claimants represented by the appellants were engaged in commerce or in the production of goods for commerce within the meaning of the words as used in that Act.

Actions under the Fair Labor Standards Act are governed by Section 216 (b) of the above code and title, which provides:

> "Any employer who violates the provisions of section 6 or section 7 (206 or 207 U.S.C.A.) of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of

himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

(2) The validity of the Fair Labor Standards Act is not involved.

(3) To show the jurisdictional facts relied upon we must necessarily refer to the whole complaint (Record pages 1-22)* because of the number of causes of action, with repetition of the jurisdictional facts, each claimant's duties, which he contends bring him within the scope of the Fair Labor Standards Act, being set out in a different cause of action.

The first cause of action (R. 2-4) is typical of all of the causes of action, alleging in paragraph I the identity of the defendants (appellees), location of the work at the Puget Sound Navy Yard, Bremerton, Washington, and the contract with the United States Navy Department; in paragraph II the duties of the particular claimant; in paragraph III the Fair Labor Standards Act; and in paragraph IV, the ultimate fact pleaded in each cause of action that by reason of his duties the claimant was engaged in interstate commerce or in the production of goods for commerce

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*Hereafter, for the sake of brevity, we shall refer to the Record with the letter "R" only, followed by the page number or numbers.

between the states or from the State of Washington to places outside thereof under the terms and definitions of the act, and that the employer violated the provisions thereof with reference to his rate of pay for over-time work.

Each cause of action was assigned to the two plaintiffs. The assignments were introduced in evidence at the trial and are admitted in the Agreed Statement of Facts (R. 49).

This appeal was taken and perfected within the time limited by law and appellants now invoke the jurisdiction of this court to hear and determine it.

## STATEMENT OF THE CASE

The Agreed Statement of Facts on Appeal (R. 47-52) is probably as concise an abstract of the case as may be made, and Appellants' Statement of Points on Appeal (R. 45-47) presents the points involved as succinctly as possible, but it may be helpful to the Court to refer in this brief to the most salient facts and contentions.

### I.

Appellees were contractors engaged in new, additional and repair construction work for the United States Navy Department at the Puget Sound Navy Yard in Bremerton, Washington, under Navy Fixed-Fee Cost-Plus Contract No. NOY4446 (R. 47), through which contract the United States Government is affected with a sufficient interest in the outcome of the case to defend the suit by means of the services of the United States District Attorney.

Appellants were white-collar workers on this

$6,000,000 project. Four per cent of the construction materials used were shipped into the State of Washington (R. 49). A. W. Hall, Ralph O. Lund, Paul Mehner, Glenn E. Tyler and A. W. Torn were draftsmen, engaged in designing and laying out the various parts of the construction work. John W. Jameson, Henry I. Mayer and Wm. J. Sheffield were timekeepers, engaged in keeping the time of all who worked upon the project.

Although all the laborers and foremen on this huge piece of construction were paid at the rate of time and one-half for their overtime in excess of forty hours weekly, the few white-collar workers were paid at the rate of time and one-tenth. The Statement of Facts (R. 50) sets forth the undisputed amounts of overtime pay, exclusive of liquidated damages, costs and attorney's fees, due these claimants if they should be held to have been engaged in interstate commerce or in the production of goods for commerce, and, in the case of A. W. Hall only, not exempt from the terms of the Act.

The principal contention of these claimants as a group is that all of them were engaged in interstate commerce because they were employed, together with all the other workers on the project, in adding to and improving the existing facilities of a great instrumentality of commerce, the Puget Sound Navy Yard, situated in the navigable waters of Puget Sound, to whose piers the markets of the world send their cargoes of materials for the use of the United States Navy and from which the newly built and repaired ships of the United States Navy, both war-

ships and supply ships, set out for every foreign and domestic port.

**Question No. 1**

The first question, therefore, is: Did the construction under this contract constitute such improvement to an already existing instrumentality of commerce that all the persons employed thereon, regardless of the nature of their duties, were engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

**II.**

A secondary part of this contention is that the workers upon this construction project, improving, as it did, the facilities of the Navy for the production of ships and marine equipment, were engaged in tasks necessary to the production of goods for commerce.

**Question No. 2**

The second question, therefore, is: Granted that the primary purpose of the United States building and repair yard is to build and repair warships, is not the function of supply and shipment of marine materials and ships to various ports important enough so that persons engaged in improving the supply and shipment facilities are employed in work necessary or helpful to the production of goods for commerce, i.e., ships and marine equipment?

**III.**

The third contention is a narrower one: That these claimants, by nature of their individual duties, were engaged in interstate commerce. Four per cent of

the materials used in the construction work were ordered and received from outside the State of Washington. That amounted to $240,000, certainly not an unsubstantial amount. The draftsmen estimated the amounts of materials to be ordered and submitted their estimates to the purchasing agent of the respondent company, who placed the orders. On receipt, the draftsmen checked the supplies as to quality and inspected the record as to such materials, also doing inspection and field engineering work during the installation of the materials, with some supervision over the installation (R. 51). They also designed and did the lay-out work on all the construction, including the piers and the railroad system which was an integral part of the new Pier No. 3.

The timekeepers kept the time of the draftsmen and all others on the project, including the workmen and foremen, all of whom were continuously working with and upon the four percent of out-of-state materials.

**Question No. 3**

Were these claimants, by the nature of their individual duties, as outlined above, engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

**IV.**

The fourth contention relates to only two of the timekeepers, William J. Sheffield and Henry I. Mayer, who worked upon the swing shift, and actually, as a part of their regular duties, received, checked in, receipted for and oversaw the unloading of all materials, both intra-state and interstate, that

arrived on the project during their hours of work (R. 50). They had no record of the amount of such shipments, and the employer introduced none although conceding their duties in this regard. The two men testified that they handled a considerable number of such interstate shipments.

**Question No. 4**

The question is, of course, whether such activities placed these two men in interstate commerce even if none of the other claimants was so engaged.

**V.**

In a separate category is the case of A. W. Hall, whom the appellees claimed to be exempt from the Act as a bona fide executive, administrative or professional worker. We bring this up as our fifth question, although according to the decisions the burden of proof regarding exemptions is upon the person asserting them.

A. W. Hall was employed from January 12, 1941, to April 8, 1941, simply as a draftsman. It is not claimed that he was exempt during this period. Thereafter, until May, 1942, he was given the title of "head draftsman" and his duties, according to the evidence of the appellees, were approximately 50% supervisory over the other draftsmen and 50% manual designing and drafting of the same nature as the duties of those whom he supervised. There is no evidence as to whom he assisted, or that he was a graduate or professional engineer, or that he had the right to hire and fire personnel, or any administrative or professional capacities other than supervision of

the other draftsmen. All the draftsmen worked under the supervision of the Superintendent and the Resident Engineer (R. 51).

**Question No. 5**

The question is whether or not during the second period of his work, from April 8, 1941, to May 1, 1942, A. W. Hall came under the exemptions of the Act because he was a bona fide executive, administrative or professional worker.

**SPECIFICATIONS OF ERROR**

For the sake of brevity we hope we may be permitted to list together as one error the entry of each of the Findings of Fact of the Trial Court, since they are exactly the same as to all eight causes of action:

SPECIFICATION OF ERROR NO. 1: The Trial Court erred in entering Findings of Fact Nos. I to VIII inclusive, to the effect that the several claimants were not engaged in interstate commerce (R. 32-33).

SPECIFICATION OF ERROR NO. 2: The Trial Court erred in entering the Conclusion of Law based upon such findings (R. 34).

SPECIFICATION OF ERROR NO. 3: The Trial Court erred in dismissing appellants' action as to each and all of the separate claimants represented by appellants here (R. 38-39).

Broadly speaking, these assignments constitute but one general error: The error of interpreting too narrowly the phrase "engaged in commerce or in the production of goods for commerce" as used in the

Fair Labor Standards Act, and in holding "that the dock and dock structures which were being built by these plaintiffs as employees of the defendants were not instrumentalities of commerce * * * " (Court's Decision, R. 41).

Since all assignments of error are essentially one, we find it impossible to segregate our argument as to the entry of the findings, conclusions and judgment, and must discuss all together, bearing in mind that the error of the Honorable Trial Court relied upon by the appellants on appeal was his application of the law to the facts, which were never seriously in dispute, as pointed out in our Statement of Points on Appeal (R. 46).

## ARGUMENT

The questions involved have already been summarized in our Statement of the Case (*supra*, pages 4-9). We shall, therefore, address our argument to them seriatim.

### I. Were the Extensions and Improvements Built at the Puget Sound Navy Yard Such Construction Upon An Already Existing Instrumentality of Commerce That All the Claimants Were Engaged In Interstate Commerce?

#### The Statute

The Fair Labor Standards Act of 1938, U.S.C.A. Title 29, Section 207, p. 485, provides:

> "Sec. 207. Maximum hours.
>
> "(a) No employer shall, except as otherwise provided in this section, employ any of his em-

ployees who is engaged in commerce or in the production of goods for commerce

"(1) (Inapplicable).

"(2) "

"(3) For a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203, p. 447, provides:

"Commerce means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

The Trial Court was of the opinion that the United States Navy was not engaged in commerce, and in the ordinary commercial sense and understanding of the term, that may be true, but no one can gainsay that the United States Navy is engaged in *transportation* on an extensive scale, between the different states and foreign countries and that its Navy Yards furnish the facilities by which it operates such transportation.

Goods moving interstate for the convenience of the United States Government are not exempted from the Act. *Clyde v. Broderick* (C.C.A. 10, July 26, 1944) 144 F.(2d) 348. *Simkins v. Elmhurst Contracting Co.*, 46 N.Y.S.(2d) 26.

The Fair Labor Standards Act applies to transportation by the Government itself in its sovereign

capacity. *Timberlake v. Day & Zimmerman* (D. C. Iowa) 49 F. Supp. 28.

The evidence in this case was to the effect (R. 48) that vast transportation facilities, in addition to the actual salt water piers, were being provided for by the work of these claimants, among others; that these consisted of a whole railroad system which was tied in with the general Navy Yard railroad system and connected with the commercial car landing of the City of Bremerton. Tracks were completed on the pier while the job was in progress, having been designed and laid out by the draftsmen who are claimants here, and ordinary railroad cars of common carriers were used on the tracks to unload materials, four per cent of which, it must be remembered, were ordered and received from outside the State of Washington.

**The "Instrumentality of Commerce" Cases**

Not many cases have been decided upon the "instrumentality of commerce" theory, as it happens that by far the largest number of cases come up under the "production of goods for commerce" phrase rather than the "engaged in commerce" phrase. This is natural, no doubt, in a manufacturing nation. It may be remarked here, in passing, that the courts have been inclined to give the broadest possible interpretation to the "goods for commerce" phase of the act, while tending to scrutinize more closely the contention that the claimant was "engaged in commerce," this no doubt because of the exemption of the employees of common carriers engaged in the

actual work of transportation (Sections 213a-4, a-9 & 213b).

Out of the number of cases construing the phrase, "engaged in commerce," the number, then, concerned with instrumentalities of commerce has been small. Nor are there many cases dealing with construction work. However, in those that do exist distinctions have been made between (1) original construction as opposed to repairs or extension and (2) ordinary buildings or structures as against those which are instrumentalities of commerce.

Two cases involving instrumentalities of commerce as such have come before the United States Supreme Court.

*Overstreet v. North Shore Corporation*, 63 S. Ct. 494, 318 U.S. 125, holds that a drawbridge over a navigable waterway, and the toll road of which it is a part, connecting with an interstate highway, are instrumentalities of commerce, and persons engaged in operating the bridge, repairing the bridge and road and selling and collecting toll tickets are engaged in interstate commerce because they are so closely related to the interstate passage of persons and goods that they must be within the contemplation of the Act. The defendant in this case argued that he was not engaged in commerce himself but only in providing facilities for others who were so engaged, but the Court said these objections were not well taken.

For authority on which to decide this case, the High Court went back to the Employers' Liability cases and declared an analogy, referring to the case

of *Pedersen v. Delaware, Lackawanna & Western Railroad Company*, 33 S. Ct. 648, 229 U.S. 146, in which an employee carrying a sack of bolts on his way to a bridge he was helping to repair, was killed by an intra-state carrier on another bridge. He was held to be engaged in interstate commerce because he was keeping an instrumentality of commerce in repair and was killed in the course of his employment.

*Pedersen v. J. F. Fitzgerald*, 63 S. Ct. 558, 318 U.S. 740, 742, went a step farther than the *Overstreet* case in holding (without opinion) that persons building *new* abutments on railroad bridges, even though not necessary nor used in any way during the course of the work being performed, the running of trains being entirely independent thereof, were engaged in commerce. On the authority of the *Overstreet* case, *supra*, the Supreme Court reversed the New York Court of Appeals, who had been of the opinion that such construction was not covered by the Act, 43 N.E.(2d) 83.

*Slover v. Wathen* (C.C.A. 4, 1944) 140 F.(2d) 258.

The employer leased a pier, repaired barges tied to it. The employee was a night watchman. The Court said: "The barges operated by Wathen moved in interstate commerce and they therefore were instrumentalities of interstate commerce." The employee was held to be in interstate commerce.

*Walling v. New Orleans Private Patrol Service* (D.C. La.) 57 F. Supp. 143, held that watchmen and guards employed by private patrol services guarding essential instrumentalities of interstate commerce

such as wharves, ships and other facilities of steamship companies, were engaged in interstate commerce.

*Walling v. Patton-Tulley Transportation Co.* C.C.A. 6, Apr. 8, 1943) 134 F.(2d) 945. The plaintiffs were employees working on dike and revetment construction in the Missouri and Mississippi Rivers under contracts of their employer with the United States. It was held that an employee is engaged in interstate commerce if he is working upon an instrumentality of interstate commerce. The objection was made that this was the construction of a facility not yet employed in interstate commerce, but the court said:

> "The short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory, and so the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce does not apply."

With equal force we may argue that Puget Sound has been a highway of interstate commerce for a long, long time and the Puget Sound Navy Yard has been situated upon that highway for a great many years, and these Navy Yard improvements, even the new installations, touch upon and are a part of that highway of commerce and facilitate the movement of the Navy's ships and barges, as well as the barges of railway cars which came to rest there and discharged their cargoes even during the construction period (R. 48).

The trial court, however, rejected this theory, on the authority of the case from the Southern District of New York, then newly decided, entitled *Joseph A. Brue, et al. v. J. Rich Steers, Inc., et al.*, now reported in 60 F. Supp. at page 668.

That case proceeded upon the narrowest possible view of the situation. The plaintiff was an inspector of concrete work on a Navy dry dock. The court decided the case on the basis of previous decisions regarding original construction of *ordinary buildings*, and rejected the "instrumentality of commerce" theory together with the case of *Walling v. Patton Tulley, supra*, but the peculiar part of this decision is that it lays stress upon the *Interpretative Bulletin No.* 5, issued by the Wage and Hour Division of the United States Department of Labor, and states that great weight should be given to administrative interpretations, quoting approvingly Section 12 of the *Bulletin* which states that "employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines," while completely ignoring Section 13 of the same *Bulletin* which follows immediately thereafter and reads:

> "Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act * * * "

In *Bulletin G*-162 of the Wage and Hour Division,

entitled, "Applicability of the Fair Labor Standards Act to Employees of Building and Construction Contractors," the Administrator, in paragraph II, states:

> "The Division does not take a definite position concerning the status under the Act of employees engaged in the original construction of essential instrumentalities of interstate commerce."

In other words, the Administrator has expressed no opinion on this question. He goes further, in this *Bulletin* G-162, *paragraph IV*, however, to define "essential instrumentalities of commerce" as follows:

> "Railroad tracks, equipment and facilities; highways; city streets over which interstate commerce regularly travels; rivers, streams, harbors and other waterways used more or less regularly in the interstate transportation of goods; bridges over which interstate commerce more or less regularly travels; pipe lines used for the interstate transportation of liquids and gas; dams, the effects of which is to enhance and improve navigable waters as instrumentalities of commerce; wharves and docks which directly facilitate the movement of goods in interstate commerce; telephone and transmission lines; telephone exchanges; telephone buildings and post offices. This list is not intended to be exhaustive * * *"

The appellants on this point are contending for a broad interpretation of the Act, one which will carry out the beneficent purposes of the Congress in promoting better labor conditions, shorter hours, a spreading of the work and uniform methods of computing overtime pay, this uniformity being very important in preventing labor unrest and dissatisfac-

tion between different groups working for the same employer. One need look no farther than the instant case for an example of the unfairness of different wage scales, where, on a $6,000,000 project conducted on the generous scale well known to cost-plus contracts, some few workers, not exceeding fifteen or sixteen persons, were singled out for economy measures totaling approximately $5,000 in savings. It is as if someone wished to be able to point to some isolated spot where economy had reigned. That it is our own Government, which passed the Fair Labor Standards Act and has been rigid in its standards of compliance for private employers, who should have instituted and who now defends this discriminatory policy on a contract where *it* is obligated to make the payment, seems inconsistent and highly ironical.

A broad interpretation of the Act, by which these claimants may be held covered because they were engaged upon an instrumentality of commerce, would cure this anomalous situation. No appellate court, so far as we have been able to find, has yet passed upon this exact question, so this Honorable Court is free to take the broad view if it is so inclined.

There are many cases giving a liberal interpretation to the Fair Labor Standards Act. See:

*Walling v. Jacksonville Paper Co.*, 63 S. Ct., 332, 317 U.S. 564, 87 L. ed. 460, in which the Supreme Court laid down the principle that "It is clear that the purpose of the Act was to extend Federal control

in this field throughout the farthest reaches of the channels of interstate commerce."

*Pickett v. Union Terminal Co.* and
*Williams v. Jacksonville Terminal Co.*, 62 S. Ct. 659, 315 U.S. 386;
*Walling v. Mutual Wholesale Food & Supply Co.* (C.C.A. 8, Minn. 1944) 141 F. (2d) 331;
*Fleming v. American Stores Co.* (D.C. Pa. 1941) 42 F. Supp. 511.

The application of the fair statements contained in those and other cases to the claims involved here, in a practical and common-sense way, is all that is necessary, and the case seems to be of first impression in an appellate court.

**II. Were the Appellants Engaged In the Production of Goods for Commerce, *i. e.*, Ships and Marine Equipment?**

**The Statute**

Further referring to the text of the Fair Labor Standards Act, U.S.C.A., Title 29, Section 203(i) provides:

> " 'Goods' means goods (*including ships and marine equipment*), wares, products, commodities, merchandise, or articles or *subjects of commerce* of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." (Italics ours)

while Section 203(j) provides:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked

on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof*, in any State." (Italics ours)

Taking these two sub-sections together we may see how really broad is the meaning of "the production of goods for commerce," as the term is used in the Act, and the courts have not been slow to extend the meaning to the farthest reaches of production.

We have found no cases in point on the facts here, but one of the broadest interpretations of this clause is to be found in the Supreme Court case of *Armour & Co. v. Wantock*, 65 S. Ct. 165 (Adv. Sheets), in which it was held that a private fire fighting force at a soap company in Chicago which produced goods for commerce, men who had nothing to do with producing goods for commerce and were not night watchmen, were necessary to the production of goods for commerce and covered by the Act.

It is under such a broad interpretation that night watchmen and maintenance men, both as employees of producing plants and employees of landlords whose *tenants* produce goods for commerce, have been held necessary to the production of goods for commerce.

*Fleming v. Atlantic Co.* (D.C. Ga.) 40 F. Supp. 654, holds clerical help, maintenance and repair men so covered.

*Walling v. American Stores Co.* (C.C.A. 3, 1943) 133 F.(2d) 840, applies the principle to maintenance

men, janitors and warehousemen, receiving clerks, office employees and shipping clerks.

*Fleming v. Kirschbaum Co.* (C.C.A. 3, 1941) 124 F.(2d) 567, applies this section to all building maintenance employees, elevator operators and firemen, where a number of the employer's tenants manufactured goods shipped in interstate commerce.

*Allen v. Moe* (D.C. Ida. 1941) 39 F. Supp. 5, held that a plaintiff employed by contractor who cut logs and delivered them afloat to match company to be processed into match blocks and matches to be sold in interstate commerce was engaged in the production of goods for commerce.

*Divine v. Levy* (D.C. La. 1941) 39 F. Supp. 44, applied the Act to common laborer employed in the erection of drilling rigs for a small oil producer although most of the oil was sold within the state, saying that the laborer took the first step in the interstate movement of the oil.

See also:

*Fleming v. Arsenal Building Corporation*, 125 F. (2d) 278. Maintenance and service employees of building covered.

*Hart v. Gregory* (N. Car. 1940) 10 S.E.(2d) 644. Night watchman who pumped water into boilers of lumber mill is engaged in an occupation necessary to production.

*Fleming v. Pearson Hardwood Flooring Co.* (D.C. Tenn. 1941) 39 F. Supp. 300. Another night watchman held covered.

*Murray v. Noblesville Milling Co.* (D.C. Ind. 1942)

42 F. Supp. 808, covers wheat storage elevator employees where milling as well as storage was carried on and the product was shipped in commerce.

The cited cases demonstrate the lengths to which the courts have gone in holding employees necessary to the production of goods for commerce.

It is our contention that the claimants here were engaged in an initial process which made possible the production of ships and marine equipment, and that these were subjects of commerce, and also instrumentalities of commerce.

**III. Were the Claimants, By the Nature of Their Individual Duties, Engaged in Interstate Commerce Because of Their Connection With the Interstate Movement of Materials?**

(1) The Draftsmen. Were these employees, because they estimated the amounts of materials to be ordered by the purchasing agent and checked the incoming materials for quality and quantity, so closely related to the movement of interstate shipments that they were "in commerce?"

(2) The Timekeepers. One of the timekeepers, John W. Jameson, had no direct connection with the interstate movement of materials (R. 50-51). He merely kept the time of others who did have such contact, and unless he may be held to have been covered on one of the broader grounds already urged, it is doubtful whether his cause of action is a good one. The Court could, however, in taking the larger view, also decide that one who keeps the time of other persons concerned with the ordering, receipt, record

keeping, unloading and otherwise handling of interstate shipments is likewise engaged in commerce.

The other two timekeepers will be discussed separately under the next heading, because their connection with commerce was more direct.

The Trial Court in his Decision states that "it is clear that these plaintiffs did nothing that had any casual connection with, or in any way affected, or related to, the movement in commerce of these materials" (R. 41). It appears that he must have overlooked the testimony (R. 51) that it was the draftsmen who estimated the amounts of supplies to be ordered and submitted their estimates to the purchasing agent, who placed the order. After the supplies arrived they checked for quality and inspected the record as to such materials. Presumably if the quality had not been up to standard or if the materials were unsuitable, they would have been sent back, again entering the channels of commerce.

The most important of the draftsmen's duties, apart from their technical work in design and layout, was their part in the ordering of materials. How would the purchasing agent have had any idea what to order if the draftsmen had not first made the lists to conform to their plans? This one step alone, it seems to us, is sufficient to place the draftsmen in interstate commerce as to the four per cent of materials that were ordered from outside the state.

See *Walling v. Jacksonville Paper Co.*, 63 S. Ct. 332, 317 U.S. 564.

The question then arises as to whether or not four

per cent is a substantial portion of materials and of the employees' time.

This Court has passed upon the question of substantiality in the case of *Southern California Freight Lines v. McKeown*, in cause No. 10,873 on April 21, 1945, 148 F.(2d) 890. In that case it was stipulated that 7% of the employee's time had been concerned with interstate commerce. It was contended that this was not substantial. This Court said:

> "It is apparent that if there had been a cut of 7% in the employee's pay check it would not be regarded as unsubstantial or *de minimis* by any laborer or his union. Nor would a reduction of his 8-hour day of 7%, that is, to 7 hours and 27 minutes, be regarded as unsubstantial. No leader of a labor union nor its members would regard such a reduction of the labor day an unsubstantial gain. * * * However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act. (Wagner Act or Fair Labor Standards Act.)
>
> "In this connection we have said in *National Labor Relations Board v. Cowell Portland Cement Co.*, 108 F.(2d) 198, 201,
>
> " 'The quantity of cement shipped out of state is not *de minimis* merely because it is but a small percentage of respondent's total sales * * *.'
>
> "We agree with the opinion of the Tenth Circuit in *New Mexico Public Service v. Engel*, 145 F.(2d) 636, that an employee occupied in interstate commerce in an enterprise but four per cent of which is interstate, and, as here, continuously engaged therein, is substantially en-

gaged in commerce within the meaning of the Act. * * *"

The cited case, *New Mexico Public Service Co. v. Engel*, 145 F.(2d) 636, holds that an engineer engaged in the manufacture and distribution of electricity, none of which was transmitted across state lines, but approximately four per cent of which was sold to customers engaged in both intra and interstate commerce was "engaged in commerce" within the Fair Labor Standards Act, because so closely related to interstate commerce and because cessation would interfere with the free movement of commerce; that Congress intended to extend Federal control in this field throughout the farthest reaches of the channels of commerce and the courts should be guided by practical considerations.

We believe that the draftsmen in the instant case were indispensable to the procurement of the goods that moved in interstate commerce and on that ground alone should be entitled to recover.

**IV. Were the Two Timekeepers Who Actually Received Interstate Shipments In More Favorable Positions Than the Other Claimants?**

The Statement of Facts (R. 50) shows that Henry I. Mayer and William J. Sheffield worked on the swing shift, and, because there was no material clerk on that shift during a part of that time, checked in, receipted for and oversaw the unloading of intra-state and interstate shipments that arrived on the job during their hours of work. No evidence was introduced as to the amounts of such shipments, the claimants testifying that they handled a considerable num-

ber of them. They also, of course, had the usual duties of timekeepers on the job.

*Walling v. Jacksonville Paper Co.*, 63 S. Ct. 332, 317 U.S. 564, affirmed the holding of the Circuit Court that employees who are engaged in the procurement or receipt of goods from other states are engaged in commerce if so engaged a substantial part of the time. The case also holds that goods delivered to a customer in the same state as the merchant but ordered especially from outside the state for him are in interstate commerce whether they come direct to the customer or stop in transit at the warehouse. This case from the Supreme Court would seem to be determinative of these questions, but there are many others. See:

*Walling v. Sanders* (D.C. Tenn. 1942) 48 F. Supp. 9;

*Walling v. Craig* (D.C. Minn. 1943) 53 F. Supp. 479;

*Eddings v. Southern Dairies* (D.C. S.C. 1942) 42 F. Supp. 664;

*Jewel Tea Co. v. Williams* (C.C.A. 10 1941) 118 F.(2d) 202.

It will be remembered that the Statement of Facts shows (R. 49) that most of the out-of-state materials came to Bremerton directly but some went first to the defendant's warehouse in Seattle and were transported to Bremerton as needed. The above cited cases discuss both points involved here.

On actual receipt of shipments, the following cases are enlightening:

*Walling v. Goldblatt Bros.* (C.C.A. 7, 1942) 126 F.(2d) 778, Certiorari denied 63 S. Ct. 528, 318 U.S. 757. The Circuit Court said:

"We conclude that those employees who order and procure, those who unload goods from without the state, at defendant's warehouse, those who check them before they are deposited on the unloading platform, those who manufacture goods at the warehouse, those engaged in maintaining, operating, caring for and servicing warehouses where production for commerce occurs, and those who pack and ship goods to Indiana from the warehouses are within the Act. Those employees, however, who are concerned solely with storage in the warehouses and in delivery of goods to the Illinois stores and those printing and preparing record books, memoranda and advertising copy are not subject to the Act."

*Walling v. Mutual Wholesale Food & Supply Co.*, 141 F.(2d) 331, also passed on this question along with many others. There were several defendant companies, none of them concerned in producing goods, so the concern of the court was wholly with the "engaged in commerce" provision, except as to possibly one defendant, the Merchandise Terminal Warehouse. As to another defendant, Lawrence, it was held:

"Such duties as have to do with unloading and checking incoming interstate shipments to Mutual and filling orders for checking and loading shipments for Thomas Stores for Mutual are within the Act. The employees of Lawrence who are engaged in any of the latter duties to a substantial extent for any week are for that period, within the Act."

*Fleming v. American Stores Co.* (D.C. Pa. 1941) 42 F. Supp. 511, and *Walling v. American Stores* (C.C.A. 3, 1943) 133 F.(2d) 840, held as follows:

The District Court held that the chain store's warehouse employees were covered except those engaged only in servicing retail stores, saying:

> "All employees who rendered services in connection with incoming goods (whether in actual physical handling of the goods or in the compilation of records or other operations pertaining to incoming goods) are subject to the provisions of the Act."

The Circuit Court affirmed the holding except that it broadened the coverage to include *all* the warehouse employees because of the continuity of movement of goods from outside the state to final destination, i.e., the retail stores.

We think on the basis of an overwhelming amount of authority this Court must conclude that Mr. Sheffield and Mr. Mayer, who actually received and checked in interstate merchandise in considerable quantities, are entitled to recover. It is the employer's duty to keep time records (FLSA USCA Title 29, Sections 211 and 215(5)) and it has been held that where such a showing has been made by the employee, the burden is upon the employer to segregate the time, keep the records and prove that the employee was not engaged in commerce a substantial portion of his time; otherwise, the employer could always defeat the employee because the latter would never be able to prove his case. *Ling v. Currier Lumber Co.* (D.C. Mich. 1943) 50 F. Supp. 204.

**V. Was A. W. Hall Exempt As a Bona Fide Executive, Administrative or Professional Worker?**

Assuming that Mr. Hall, together with the other

Montague 140 F(2) 500

draftsmen, was engaged in interstate commerce or in the production of goods for commerce, did his coverage under the Act cease on April 8, 1941, when he was made head draftsmen, spending approximately 50% of his time in designing and drafting and 50% in supervision of the other draftsmen. We think if we have shown the engagement in commerce, the burden is upon the appellees to prove the exemption, since the Fair Labor Standards Act is a remedial statute and exemptions and exceptions are to be strictly construed, with the burden upon the person asserting them. *Brown v. Minnigas Co.* (D.C. Minn. 1943) 51 F. Supp. 363, citing to support statement that exemptions are affirmative defenses the case of the Michigan Circuit Court in *Cooper v. Gas Corporation* (1941) 4 Wage & Hour Reporter 550.

The Fair Labor Standards Act is a remedial statute and must be liberally construed, exceptions and exemptions to be strictly construed. *Fleming v. American Stores Co.* (D.C. Pa. 1941) 42 F. Supp. 511; *Fleming v. Hawkeye Pearl Button Co.*, 113 F.(2d) 52.

In the state of the record, we can see nothing to exempt Mr. Hall in any of the three categories. The statute, U.S.C.A. Title 29, Sec. 213 (a) (1), is brief, but the regulations of the Administrator, U.S.C.A. Title 29, Chapter V, Code of Federal Regulations, Part 541, Sections 541.1, 541.2 and 541.3, pages 625-27, are too long to quote here verbatim, so we merely refer to them.

As to Section 541.1, relating to Executives, we submit that Mr. Hall, so far as the record shows, does not fit (A), (C), (E) or (F); that these qualifications,

or disqualifications, are in the conjunctive and that an employee must meet all of them to be exempted. *Fanelli v. U. S. Gypsum Co.* (C.C.A. N.Y. 1944) 141 F.(2d) 216; *Walling v. Yeakley* (C.C.A. Colo. 1944) 140 F.(2d) 548; *Walling v. Emery Wholesale Corporation* (D.C. Ga. 1943) 49 F. Supp. 192, aff. 138 F.(2d) 548.

As to Section 541.1, relating to Administrators, which is in the disjunctive as to the subsections of (B) but in the conjunctive as to (A) and (B), we submit that there is no showing as to Mr. Hall's salary (A), and no showing under (B) (1) that he was assistant to any executive or administrator; no showing under (B) (2) that his non-manual work (50%) was directly related to management policies or general business operations or that in his technical work he exercised discretion and independent judgment; no showing under (B) (3) that he performed special non-manual assignments and tasks related to management policies or general business operations; and nothing whatever to connect him up with (B) (4) relating to common carriers. There is, in fact, nothing in the record to suggest that Mr. Hall was any kind of administrator. He was in fact, a working foreman of the draftsmen.

*Sun Publishing Co. v. Walling* (C.C.A. 6, 1944) 140 F.(2d) 445, held that a working foreman of a composing room whose work was 80% the same as those supervised and 20% supervisory was not an administrative employee.

As to Section 541.3, relating to Professional employees, Mr. Hall fails to come within the exemp-

tions because here again the sub-sections are in the conjunctive and the employee must meet all of them to be excepted. Mr. Hall fails to meet any of the sub-sections, so far as the evidence shows, except possibly (A) (1) and (2), conceivably (3). On (A) (4) alone, by which he must not do work of the same nature as non-exempt employees more than 20% of his time, the disqualification fails. His was 50-50, by the appellees' own witness. There was no testimony that he was a graduate or professional engineer, or especially well qualified or given any considerable amount of authority. He was a supervising draftsmen and no more during the second period of his employment, from April 8, 1941 to May 1, 1942.

## CONCLUSION

The Fair Labor Standards Act is accumulating about it a very large amount of interpretative case law, based not only upon the Act but upon the Administrator's regulations. Most of it, we are glad to say, from extensive perusal of the cases, is liberal in character, although there are certainly differences of opinion among the courts on many of the finer points. But we have every confidence in the liberal tradition of this Court in exercising every intendment in favor of the beneficiaries of a remedial act, intended to correct grave labor abuses, among which are discrimination among employees, lack of uniformity, favoritism. We believe that the Congress in passing and the President in signing the Act, intended its benefits to extend to that portion of labor known as the white-collar workers, provided only that they can show they were

engaged in commerce or in some capacity necessary to the production of goods for commerce. We believe that on any one of our theories of the case, the appellants here are entitled to judgment as claimed, and that no one of the claimants should fail.

Respectfully submitted,

FLORENCE MAYNE,

*Attorney for Appellants.*